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No. 89-1342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CANDEE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

JAMES MYERS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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QUESTIONS PRESENTED

Between April, 1984 and September, 1985 Candee Construction Company ("Candee") built two road construction projects ("48" and "45") in the South Dakota Black Hills. During project construction several disputes arose relating to the types and quantities of materials on the project as well as the construction requirements imposed on Candee by the South Dakota Department of Transportation ("SDDOT"), all of which delayed project completion. Time extensions were requested in August, 1984 on each project but no action was taken by SDDOT on those requests until July and August, 1986, respectively. In August, 1985 a third contiguous project ("41") was advertised and let for bid. Two weeks prior to the bid letting, James Myers, then South Dakota Secretary of Transportation, withdrew Candee's pre-qualification rating of $38.1 million in contracts and specifically withheld Candee's ability to draw a bidding set of plans on the 41 project. Candee filed a complaint alleging, among others, causes of actions under 42 U.S.C. § 1983 against Defendants Myers, Piper, Landguth, Engel and Bintliff.

The trial court granted individual Defendants' motion for Summary Judgment on each of Candee's claims under 42 U.S.C. § 1983. The questions presented for review are as follows:

A. Did Myers' act of withdrawing bidding rights without notice or hearing constitute a violation of Candee's Fourteenth Amendment rights to its Due Process property interests?

B. Does the existence of state tort remedies preclude maintenance of Candee's claims of deprivation of its due process liberty and property interests?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners were appellants in the South Dakota Supreme Court and Plaintiffs in the Circuit Court, Seventh Judicial Circuit for the State of South Dakota. The actions against the state Defendants and the Individual Defendants were consolidated in a single Complaint. However, the Decision of the Trial Court on the Individually Named Employees' Motion for Summary Judgment ordered that the actions be separately tried. (Appendix B., p. 43a).

Candee Construction Company, Inc. vs. South Dakota Department of Transportation, the State of South Dakota, James Myers, Charles Piper, Dennis Landguth, Gary Engel, Glenn Bintliff, (each in their individual and official capacities), and Charles Larson, Merle Buhler, Vernon Bump, James Hammell, Clint Gregory, and Larry Dejong, (each in their individual capacities); Civil File No. 87-210 (Circuit Court, Seventh Judicial Circuit, South Dakota) and Nos. 16552, 16553, and 16558 (SD Sup. Ct.). The state Defendants have no interest in the outcome of this petition. See Supreme Court Rule 19.6.

In the Circuit Court, Plaintiff voluntarily withdrew the §1983 actions against Charles Larson, Merle Buhler, Vernon Bump, James Hammell, Clint Gregory and Larry DeJong. As with the state Defendants, those individuals have no interest in the outcome of this petition. See Supreme Court Rule 19.6.

The Plaintiff, the state Defendants (State of South Dakota and SDDOT) and the remaining Individual Defendants (Myers, Piper, Landguth, Engel, and Bintliff) were parties to the appeal to the South Dakota Supreme Court. Only

the remaining individually-named Defendants are Respondents in the action before this Court.

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IN THE

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No. 89- _____

CANDEE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

JAMES MYERS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Candee Construction, Inc., a North Dakota Corporation, respectfully requests that a Writ of Certiorari be issued to review the opinion of the Supreme Court of the State of South Dakota. That Court's opinion

misinterprets the provisions of federal statutes under Title 42, § 1983 et seq. and misapplies previous decisions of the United States Supreme Court which have ruled on the federal constitutional and statutory questions involved. The South Dakota Supreme Court ("Court below"), in affirming the Trial Court, determined that the grant to Candee of an oral presentation ten days after withdrawal of a perfected property right without the benefit of presentation of witnesses or cross-examination was a pre-deprivation hearing providing adequate process for the right already withdrawn. That Court also affirmed (without discussion) the Trial Court's holding that the existence of state tort remedies precluded successful maintenance of claims relating to Candee's procedural and substantive due process liberty interest.

If undisturbed, the opinion will ratify the arbitrary and capricious actions by South Dakota state employees relating to withdrawal of Candee's rights and interests without adequate process and without the ability to have such actions heard in a federal statutory context. Absent reversal of

the opinions below, the likelihood of future similar actions by South Dakota State personnel is great and their actions will not be subject to review in South Dakota State Courts.

Opinions Below

The opinion of the South Dakota Supreme Court, reported at 447 N.W.2d 339, is included at Appendix A. The final unpublished opinion of the Circuit Court is included at Appendix B. The unpublished order of the South Dakota Supreme Court denying rehearing is included at Appendix C. Final orders and judgment are as follows: Final Order Granting Summary Judgement in Favor of Defendants Myers, Piper, Landguth, Engel, and Bintliff (November 8, 1988; Circuit Court, Seventh Circuit, South Dakota); Final Judgment, SDCL 15-6-54(b)(January 3, 1989; Circuit Court, Seventh Circuit, South Dakota). Appendix D.

Jurisdiction

The judgment of the South Dakota Supreme Court was entered on October 11,

1989. The order denying rehearing was entered on November 17, 1989. The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

Constitutional, Statutory, and Regulatory Provisions Involved

The Fourteenth Amendment to the United States Constitution prevents states from depriving any person of life, liberty, or property without due process. Corporations are considered "persons" within the protection of the Due Process Clause of the Fourteenth Amendment. Title 42, United States Code, § 1983, provides that every person who, under color of any statute or regulation of any state subjects any person to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action for redress. The Constitutional provisions, relevant portions of the federal statutes, state administrative regulations, and relevant specifications relating to the Due Process considerations herein are contained in Appendix E.

Statement of the Case

In February and June, 1984, Candee was the low bidder on projects 48 and 45, respectively, two road construction contracts in the Black Hills of South Dakota. As a result of increases in various contract items as well as the enforcement of construction requirements in excess of a reasonable road construction standard, completion of each of the projects was seriously delayed. For the 48 and 45 projects combined, the SDDOT plans called for 975,841 cubic yards of excavation. Of that total, SDDOT estimated that 324,187 cubic yards would be drill and blast rock. Candee maintains that it excavated a minimum total of 1,187,000 cubic yards and, of that total, at least 503,952 cubic yards were drill and blast rock.

Candee also encountered overruns of water required to be applied to the projects. At least 9,200,000 gallons of water were required in addition to the amount of water called for in SDDOT's plans, paid for at a price fixed by the SDDOT in the bid documents.

The § 1983 claim against Myers concerns denial of Candee's request for bidding plans and proposal on a third contiguous project, "41". Under the South Dakota Administrative Rules, in order for a prospective bidder to bid on a state highway construction project over $100,000, it must first obtain a classification and maximum rating from SDDOT each year. A.R.S.D. 70:01:05:02. (Appendix E). In April, 1985, the prequalification committee for SDDOT issued a letter that prequalified Candee to bid on a maximum of $38,130,000 in highway construction contracts. On August 6, 1985, when Candee and other contractors were first informed that plans had been prepared and were being issued for that project, Candee requested that it be given a bidding set of plans and proposal for the 41 project. The 48 project had been completed as of June 1, 1985 and the 45 project was within two weeks of completion. Defendant James Myers, then secretary of SDDOT, by letter of August 12, 1985, refused to issue bidding

documents to Candee on that project. [1] Myers' decision was based on Paragraph 2.3 of the 1977 edition of the SDDOT Standard Specifications under which SDDOT reserves the right to refuse to issue a bidding proposal if a bidder has "uncompleted work which, in the judgment of the Department, might hinder or prevent the prompt completion of additional work if awarded" and in cases of "unsatisfactory performance on previous work."[2] Myers' letter[3] stated that Candee had failed to meet the completion dates on each of 48 and 45, causing "inconvenience to the traveling public" and "economic loss to businesses dependent upon them". [4] The August 12,

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1/ On August 22, 1985, Myers confirmed to the South Dakota Transportation Commission that his intention was to deny Candee plans for all projects, not just the 41 project.

2/ South Dakota Standard Specifications for Roads and Bridges, Paragraph 2.3, included at Appendix E.

3/ Myers' August 12, 1985 letter. Appendix F.

4/ Time extension requests had not yet been decided upon. When they were finally decided in July and August of 1986, the entire time extension on 48 was given and all but 19-1/2

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1985 withdrawal of the ability to bid simply stated that Candee's request for bidding plans and proposals was denied. It did not function as a notice of charges with any accompanying rights to appeal, but was an effective total withdrawal of Candee's prequalification and maximum rating of $38.1 million.

The Trial Court found that Candee had a federally-protected property interest in its prequalification to draw plans under South Dakota law.[5] However, the Trial Court determined that an oral presentation by Candee to the South Dakota Transportation Commission on August 22, 1985, six days before the bid letting for 41, constituted a pre-deprivation hearing. That holding was affirmed by the South Dakota Supreme Court.[6] Because of its affirmation of

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days were granted on 45. By specification the completion dates were then amended consistent with the time extensions granted, thereby obviating the stated basis for Myers' withdrawal.

5/ Cf. Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982).

6/ 447 N.W.2d at 345.

the Trial Court's holding on the pre-deprivation hearing, the South Dakota Supreme Court did not address the issue of Candee's property interest in its prequalification in South Dakota.

The § 1983 claims against the individually-named defendants Piper, Landguth, Engel, and Bintliff concern actions taken by those SDDOT employees during construction of 48 and 45. Candee's claims against them relate to the excessive water requirements, excess compaction and finishing requirements, non-payment and slow payment of contract monies owed, communication by the individual defendants of false and misleading information to third persons, failure of the individual defendants to comply with various implied and express contract terms, and the communication of a threat on the life of Candee's superintendent by defendant Bintliff. Candee's claims also include failure by the individual defendants to timely consider time extension requests and claims for additional compensation (all of which were denied), and other examples of contract nonfeasance and misfeasance by the individual defendants.

On the claims against those § 1983 defendants (other than Myers), the Trial Court held: "All in all, there are adequate state court remedies against these individually named employee-defendants for libel, slander, defamation, and intentional interference with contract rights or whatever. These actions complained of are for violations of duties of care arising out of state tort law."[7] The Supreme Court did not discuss the claims raised against individual defendants Piper, Landguth, Engel, and Bintliff but affirmed the Trial Court's dismissal of the civil rights claims against them. 447 N.W.2d at 342. (Appendix A, p. 20a).

Reasons for Granting the Writ

This court should grant certiorari because the courts below have misapplied well-settled opinions of this Court relating to adequate process necessary for preservation of property and liberty interests under the Fourteenth Amendment. The courts below were

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7/ Appendix B, p. 31a.

clearly wrong in holding that an oral presentation without benefit of witnesses or cross-examination held ten days after withdrawal of a determined property interest was a pre-deprivation hearing and therefore adequate process. To allow the decision of the South Dakota Supreme Court to remain unaltered would be violative of the due process hearing requirements repeatedly set out by this Court.

This Court has also firmly stated that it is not necessary to exhaust all available state remedies prior to maintenance of an action under 42 U.S.C. § 1983. To enforce such a requirement in the circumstances here would force Candee to pursue state remedies to the exclusion of available federal remedies. Requiring persons in an action against state employees to first exhaust all state remedies would frustrate the purpose of 42 U.S.C. § 1983.

I. A HEARING ON THE WITHDRAWAL OF A CONTRACTOR'S PROPERTY RIGHTS WHICH TAKES PLACE AFTER THOSE PROPERTY RIGHTS HAVE BEEN WITHDRAWN CANNOT CONSTITUTE A PRE-DEPRIVATION HEARING TO SATISFY PROCEDURAL DUE PROCESS.

Without even a citation to governing federal law and in the face of facts to the contrary the Court below found that a hearing which took place after Candee had its property right[8]

8/ The trial court found that South Dakota statutory law and South Dakota Administrative Rules (A.R.S.D. 70:01:05:01 et seq.) created a protected property interest in a contractor's prequalification to draw bidding sets of plans on state contracts. (Trial Court Opinion, Appendix B, p. 32a, 35a). Curiously, the Court below ruled that, "[w]hether or not the right to bid on a highway construction project is a constitutionally protected right is moot because the hearing before the highway commission afforded Candee adequate due process." 447 N.W.2d at 345. (Appendix A p. 18a). The logic of the Court below puts the cart before the horse. The threshold question in a 42 U.S.C. § 1983 claim is whether a protected interest exists. If no protected interest exists, no due process is required. Since the Court below did reach the due process issue and the trial court found a protected property interest it must

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withdrawn "afforded Candee adequate due process". 447 N.W.2d at 345 (Appendix A, p. 18a). Inexplicably, the Trial Court specifically found that the August 22, 1985 Transportation Commission meeting constituted a pre-deprivation hearing. (Appendix B, p. 34a).

The Court below made no explicit distinction between a pre- and post-deprivation hearing. 447 N.W.2d at 345. (Appendix A, p. 16a - 18a). However, it did rule that, "[i]t is undisputed that Candee was given a hearing before the State Highway Commission before the 41 project's bid letting." 447 N.W. 2d at 345. (Appendix A, p. 18a). This clearly implies that the Court below found that Candee had received a pre-deprivation hearing. Such a finding is, however, contrary to and severely undermines the procedural due process requirements articulated by this court.

It is an essential principle of due process that a deprivation of life,

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be assumed, for the purposes of appeal, that Candee has a protected property interest under South Dakota law.

liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.,S. 306 313 (1950). In Cleveland Bd. of Edc. v. Loudermill, 470 U.S. 532 (1985), the Court set out these principles:

> We have described 'the root requirement' of the due process clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.' Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971); see Bell v. Burson, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591, 29 L. Ed. 2d 90 (1971).

Id. at 542 (footnote omitted; emphasis in original). These principles were reaffirmed in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), where the Court said, "It has become a truism that 'some form of a hearing' is required before the owner is finally deprived of a protected property interest." 455 U.S. at 433 (emphasis added). The Court went

on to say, ". . . to put it as plainly as possible, the state may not finally destroy a property interest without first giving a putative owner an opportunity to present his claim of entitlement." Id. at 434. These cases establish that a pre-deprivation hearing must generally be provided before the taking of a constitutionally-protected interest.[9]

9/ See, also, Perry v. Sindermann, 408 U.S. 593 (1972) (loss of state university teaching position); Morrissey v. Brewer, 408 U.S. 471 (1972) (determination of parole); Stanley v. Illinois, 405 U.S. 645 (1972) (removing unwed father's custody over his children); Bell v. Burson, 402 U.S. 535 (1971) (suspending driver's license). This Court has recognized that in limited circumstances a post-deprivation hearing may satisfy the requirements of procedural due process. In Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984), this court held that a pre-deprivation hearing must be provided if it is not impossible or impractical for the state to do so. See, Ingraham v. Wright, 430 U.S. 651 (1977) (child may be subjected to corporal punishment in public school without prior hearing); Matthews v. Eldridge, 424 U.S. 319 (1976) (upholding Social Security Administration's provision for notice and an opportunity to introduce rebutting evidence, but no evidentiary hearing, prior to (con't to next page)

The Court below, in finding that a hearing which took place after the deprivation occurred ruled in direct contradiction to federal law as articulated by this Court and set a precedent which seriously undermines the protections of procedural due process under federal law.[10] The decision of the Court below would make the protections of procedural due process illusory. The fact that a tribunal may have the power to overturn a decision to deprive an individual of a property right does not alter the fact that the deprivation without any process has already

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termination of federal disability benefits); Arnett v. Kennedy, 416 U.S. 134 (1974) (upholding statutory procedure for dismissing civil service employees which provided for hearing after dismissal). Neither the Trial Court nor the Court below made any findings which would support the adequacy of a post-deprivation hearing on the grounds of impossibility or impracticality.

10/ The Court below specifically found that, "[o]n August 12, 1985 Myers denied Candee's request for a proposal and plans on the 41 project." 447 N.W.2d at 345. (Appendix A, p. 17a).

occurred.[11] Nor does it alter the requirements of procedural due process applicable to any attempt by the state to deprive an individual of a protected property right. The dictates of procedural due process must apply as of the time of deprivation.[12]

11/ The apparent logic of the Court below and the Trial Court was that a hearing held prior to the bid of a project for which bidding plans had been denied would suffice as a pre-deprivation hearing since the critical event, in their logic, is the bidding of that project. This conclusion misplaces the gravaman of the property right. The property right created under South Dakota law is the right to draw bidding plans, not whether a contractor actually participates in a particular bid.

12/ Myers had the power to withdraw the property right as SDDOT's secretary in August 1985 per specification 2.3 (Appendix E, p. 57a). Since he had the power to act on behalf of the SDDOT, the right was withdrawn when he issued his August 12, 1985 letter (Appendix F). That right was not withdrawn by the "hearing" on August 22, 1985 since it had already been withdrawn prior to the grant of any process. In spite of this, the Trial Court held, that ". . . it's sufficient, I mean, that the protected procedural due process by way of notice starts after the secretary makes his mind up, makes his decision. So, when he writes his letter on

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The opinion of the Court below, if allowed to stand will permit the state to effectively circumvent due process requirements if a "hearing" is provided after the deprivation has taken place, in this case the denial of the right to draw bidding plans, but prior to the time the contract is let. The act of bidding is not related in any way to the protected right to draw bidding plans on state contracts, and it was that right to draw bidding plans which the state withdrew from Candee.

The decision of the Court below opens the door to the argument that, for example, the state may suspend a person's driver's license without hearing, but satisfy due process requirements if a hearing is provided before the person intended or had an opportunity to drive. The rulings of this Court preclude such circumlocution. In Bell vs. Burson, 402 U.S. 535 (1971) this Court held that procedural due process required that the state provide

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August 12th, then CCC has its notice and has its hearing before the commission." (Trial Court Opinion, Appendix B, p. 35a).

a hearing prior to suspending a driver's license. The reason for requiring the hearing prior to suspending the license is clear. The protections of procedural due process attach to the state-created right to the entitlement of the license. The property right is in the entitlement to the license. Whether a person ever drives after receiving a license is irrelevant to the requirements of due process applicable to the suspension of the license.

The decision of the Court below improperly attempts to shift the triggering mechanism of the time at which procedural due process applies to protect an individual's property interest. The decision is contrary to the dictates of federal law and decisions of this Court and creates a direct conflict between federal law and the Supreme Court of South Dakota.

The Court below has effectively circumvented due process protections by finding a pre-deprivation hearing after a deprivation has taken place and failing to engage in a post-deprivation analysis consistent with constitutional law and previous opinions of this Court.

II. THE EXISTENCE OF STATE LAW OR ADMINISTRATIVE REMEDIES IS NOT A BAR TO ACTIONS UNDER 42 U.S.C. § 1983.

In affirming the Trial Court's ruling[13] regarding Candee's liberty rights claims the Court below adopted a ruling which is diametrically opposed to decisions of this federal law as interpreted by this Court. The Trial Court repeatedly ruled that it was granting the individual defendants' Motion for Summary Judgment on Candee's liberty rights claims because there existed other state remedies. (Trial Court Opinion, Appendix B, p. 4-6, 8) and specifically found Candee's claims were barred due to failure to exhaust available state remedies. (Trial Court Opinion, Appendix B, p. 39a). Such a finding is totally contrary to the rulings of this Court.

In Monroe v. Pape, 365 U.S. 167 (1961), this Court characterized § 1983 as "supplementary to the state's remedy"

13/ In its opinion, the Court below did not address Candee's substantive and procedural liberty due process claims, implicitly affirming the Trial Court's rulings.

and observed that "the latter need not be first sought and refused before the federal one is invoked." Id. at 183. This Court has repeatedly cited Monroe in describing the "no exhaustion" policy applicable in § 1983 litigation. See, e.g., Preiser v. Rodriquez, 411 U.S. 475, 492, n. 10 (1973); Houghton v. Shafer, 392 U.S. 639, 640 (1968); Damico v. California, 389 U.S. 416, 417 (1967).

In Patsy v. Board of Regents, 457 U.S. 496 (1982), this Court, reversing a decision of the Fifth Circuit in which that court had adopted a flexible exhaustion test, stated that it had on numerous occasions, beginning with McNeese v. Board of Educ., 373 U.S. 668, 671-73 (1963), rejected the argument that federal courts should dismiss § 1983 actions when the plaintiff fails to exhaust state administrative remedies. Patsy, 457 U.S. at 500. The Court reiterated that "exhaustion is not a prerequisite to an action under § 1983," adding that it had "not deviated from

that position in the nineteen years since McNeese." Id. at 500-01.[14]

In Felder v. Casey, 487 U.S. 131 (1988), this Court addressed the issue of whether a Wisconsin statute requiring notice of claim prior to a state court action against a local government entity or officer could be held applicable to a § 1983 action brought in state court. In concluding that the Wisconsin notice of claim provision may not bar a § 1983 action in state court, this Court noted:

14/ It is true that under Parratt v. Taylor, 451 U.S. 527 (1981), the existence of alternative state remedies may provide a defense on the merits as providing all the procedure that is due under the requirements of due process when the complained-of acts are "random and unauthorized" as opposed to an "established state procedure". However, the Trial Court made no such ruling. The Trial Court could not make such a ruling since significant material fact issues exist as to whether the conduct was "random or unauthorized" or the enforcement of an "established state procedure." Furthermore, Parratt does not apply to substantive due process claims since substantive due process protects individuals from official acts which "may not take place no matter what procedural protections accompany them." Hudson v. Palmer, 468 U.S. 517, n.4 (1984).

> Finally, the notice provision operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant. We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries.

Felder, 487 U.S at 148.

The trial court's dismissal, as affirmed by the Court below on the grounds of the existence of alternative state remedies, is irreconcilable with the statutory construction of 42 U.S.C. § 1983 as interpreted by this Court.

Conclusion

The South Dakota Supreme Court has eviscerated the basic constitutional protections afforded individuals by 42 U.S.C. § 1983. If uncorrected, this decision will preclude individuals from the protections of due process in South Dakota State Courts. For the foregoing

reasons, Petitioners pray that the court grant a writ of certiorari and reverse the decision below.

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APPENDIX

APPENDIX A

#16552, 16553, 16558-aff in pt, rev in pt & rem-HEEGE, Circuit Judge

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

CANDEE CONSTRUCTION COMPANY, INC.,
a North Dakota Corporation,
Plaintiff and Appellant,

v.

SOUTH DAKOTA DEPARTMENT OF
TRANSPORTATION, ET AL.,
Defendants and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT

OF THE SEVENTH JUDICIAL CIRCUIT

PENNINGTON COUNTY, SOUTH DAKOTA

* * * *

HONORABLE ROLAND E. GROSSHANS
Judge

* * * *

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ARGUED MAY 22, 1989
OPINION FILED OCTOBER 11, 1989

Candee Construction Company (Candee) served and filed a complaint against the South Dakota Department of Transportation (DOT) as well as James Myers (Myers), former South Dakota Secretary of Transportation, and present DOT employees Charles Piper, regional engineer; Dennis Landguth, area engineer; Gary Engel, project engineer; and Glenn Bintliff, project inspector (individual defendants). Candee alleges several causes of action arising from highway construction projects on Highway 16 in the Black Hills during 1984 and 1985. The circuit court granted DOT's and individual defendants' motions to dismiss certain causes of action and partial summary judgment for other causes of action. Both Candee and DOT appeal the circuit court's decisions.

Summarized below is the circuit court's disposition of Candee's causes of action and our decision.

1. The circuit court entered an order granting partial summary judgment which denied Candee's claims seeking additional compensation for rock removed and water applied during construction under the terms and provisions of the contracts. We affirm this order.

2. The circuit court preserved Candee's claim for additional compensation for water used in excess of that required by a reasonable construction standard. We affirm the circuit court's refusal to dismiss this claim.

3. The circuit court dismissed, for failure to state a cause of action, Candee's claims for additional compensation based on alleged breach of contract and implied contract, and equitable claims of unjust enrichment and defective plans. We reverse the circuit court's dismissal of these claims.

4. The circuit court entered summary judgment, dismissing the civil rights claims of Candee against individual defendants and denying Candee's punitive damage claim. We affirm the circuit court's judgment and order.

5. The circuit court entered an order taxing costs against Candee, including the travel and living expenses of the court reporter who attended the taking of depositions in discovery of this case. We reverse the circuit court's order.

FACTS

In 1984 Candee was the low bidder on projects 48 and 45, two construction contracts in the Black Hills. Candee was required to apply water for compaction and to excavate rock in excess of DOT's plan estimates which materially changed its costs to complete the contracts. Completion of the projects was delayed. In its bid specifications, DOT combined rock and earth removal into one category, unclassified excavation, and stated it would pay the same price per cubic yard for both earth and rock removal. For the 48 and 45 projects combined, DOT plans called for 975,841 cubic yards of excavation. Of that total, DOT estimated that 324,187 cubic yards would be rock. Candee claims it excavated a total of 1,187,000 cubic yards and at least 503, 952 cubic yards were of rock. DOT has paid the unit price for the total amount of cubic yards excavated by Candee except for 50,000 cubic yards which are disputed.

Candee also encountered overruns for water applied to the projects to assist in compacting the roadbed. Approximately 9,200,00 gallons of water were required in addition to the amount

of water estimated by DOT. DOT paid Candee for the excess amount of water at the contract price established by DOT, $6.00 per thousand gallons of water.

Prior to completion of the 48 and 45 projects, Candee prepared to bid on project 41, another road construction project in the Black Hills. James Myers, then secretary of DOT, refused to issue bidding documents to Candee on the 41 project, citing Candee's failure to complete the 48 and 45 projects in a timely fashion.

1. ADDITIONAL COMPENSATION FOR ROCK AND WATER UNDER THE CONTRACT

Candee claims that it is entitled to additional compensation under the contract for rock excavated in excess of DOT's plan estimates. Candee bases its claim on specifications 4.2 and 4.3.

We first examine Candee's claim for additional compensation for rock excavation under Section 4.2 which provides in pertinent part:

> ALTERATIONS OF PLANS - The Department reserves the right to make at any time during the progress of the work such increases or decreases in quantities and such alterations in the work

within the general scope of the contract, including alterations in the grade or alignment of the road or structure or both as may be found necessary or desirable. Such increases or decreases and alterations shall not invalidate the contract nor release the surety, and the contractor agrees to accept the work as altered, the same as if it had been a part of the original contract.

* * *

Unless alterations in plans or increases or decreases in contract quantities materially changes (sic) the cost of performing a contract item or items, such item or items shall be performed as a part of the contract and will be paid for at the contract price or prices.

When alterations in plans or increases or decreases in contract quantities materially changes (sic) the cost of performing a contract or items, an allowance will be made on such basis as may have been agreed to in advance of performance of the work involved.

Price for items which are predetermined by the Department and set forth in the specifications and/or the

> proposal form, will not be subject to negotiation because of alterations in plans or quantity changes.

Section 4.2 applies only if DOT alters the plans or otherwise increases or decreases the contract quantities. The quantities set forth in the bid documents are clearly and repeatedly identified as estimates only. Contractors were warned that the actual amount might be greater. DOT placed the burden on contractors to accurately determine the amount of rock to be excavated. Therefore, the fact that Candee encountered rock in excess of DOT estimates was not a change in quantities by DOT.

We next examine Candee's additional compensation claim for water under section 4.2. DOT vastly increased the amount of water Candee had to apply over the 5 gallons of water per cubic yard estimated by DOT in the plans. The rate of compensation for water, $6.00 per thousand gallons, was predetermined by DOT. DOT contends that the last paragraph of section 4.2 precludes Candee from receiving compensation greater than the predetermined rate. This paragraph provides: "Prices for

items which are predetermined by the Department and set forth in the specifications and/or the proposal form, will not be subject to negotiation because of alterations in plans or quantity changes." The plain meaning of the paragraph excludes renogotiation of predetermined prices for items such as water. The circuit court properly held that Candee was not entitled to additional compensation for water under section 4.2.

Candee also urges that it is entitled to additional compensation for rock excavation and water under section 4.3. Section 4.3 provides:

> EXTRA WORK - The Contractor shall perform authorized work, for which there is no price included in the contract, whenever it is deemed necessary or desirable in order to complete fully the work as contemplated. Such work shall be performed in accordance with the specifications and as directed, and will be paid for as provided under Section 9.5.

Extra work is defined in clause 1.27 of the Specifications Book as: "An item of work not provided for in the contract as

awarded but found by the Engineer essential to the satisfactory completion of the contract within its intended scope." The court defined the term "extras" as used in connection with construction contracts in Sweetman Const. Co., Inc. v. State, 293 N.W.2d 457 (S.D. 1980). We held that "extras" means work or costs arising outside of and entirely independent of the contract; that is, something not required in its performance, not contemplated by the parties, and not controlled by the contract." 293 N.W.2d at 460.

Both rock excavation and water for compaction were a material aspect of each project.

Candee's excavation bid included rock excavation, and DOT set out in its bid specifications that water would be used for compaction. These items were provided for in the contract and were not work subsequently found by the engineer to be essential for the satisfactory completion of the project. Rock excavation and water for compaction were items required for the performance of the contract, contemplated by the parties and controlled by the contract.

These items cannot be properly considered as extra work.

2. ADDITIONAL COMPENSATION FOR WATER UNDER A REASONABLE CONSTRUCTION STANDARD

Candee made further claim that it was entitled to additional compensation because the water necessitated by DOT exceeded that required by a reasonable construction standard. The circuit court preserved this claim, refusing to dismiss the claim, relying on Northern Imp. Co. v. S.D. State Highway Com'n, 314 N.W.2d 857 (S.D. 1982). We agree. A reasonable construction standard applies to this case and if the water required by DOT exceeded that required by a reasonable construction standard, Candee is entitled to compensation for such excess.

3. BREACH OF CONTRACT, IMPLIED CONTRACT AND EQUITABLE CLAIMS

The circuit court dismissed Candee's breach of contract, implied contract and equitable claims based on the rationale of G. H. Lindekugel & Sons, Inc., v. South Dakota St. Hy. C., 87 S.D. 32, 202 N.W.2d 125 (1972). In Lindekugel, the court construed SDCL 31-

2-34 through 31-2-39 as a procedural remedy and not an appropriation statute that would allow payment of a judgment for breach of contract against the State of South Dakota. The court also based its decision upon Article XI, §§ 8 and 9 of the state constitution. Upon review, we believe the interpretation provided by the Lindekugel court is overly restrictive.

We reach this conclusion by first examining the plain meaning of SDCL 31-2-34 and SDCL 31-2-38. SDCL 31-2-34 provides:

> The State of South Dakota may be sued and made defendant in any court in which an action is brought against the South Dakota department of transporation respecting any claim, right, or controversy arising out of the work performed, or by virtue of the provisions of any construction contract entered into by the South Dakota department of transportation.

Further, SDCL 31-2-38 provides that any successful litigant obtaining a judgment shall be paid "out of the state highway fund from all the moneys levied and collected by the state by general state taxation for state highway purposes, or

appropriated for state highway purposes."

The plain meaning of "any claim, right or controversy arising out of the work performed, . . . ", SDCL 31-2-34, permits an action either under the terms of the contract or outside of it for work performed. This interpretation is also supported by the fact that the phrase is followed by the disjunctive phrase "or by virtue of the provisions of any construction contract . . . " SDCL 31-2-34. If contractors are limited to actions under the provisions of the contract, then the phrase "any claim right or controversy arising out of the work performed . . ." is meaningless. In interpreting statutes, all provisions within a statute must be given effect if possible. Hartpence v. Youth Forestry Camp, 325 N.W.2d 292 (S.D. 1982); Matter of Silver King Mines, Permit EX-5, 315 N.W. 689 (S.D. 1982). We believe that this interpretation gives effect to all of the provisions of SDCL 31-2-34.

Even if a contractor can bring suit under SDCL 31-2-34, an appropriation is necessary to pay a judgment. Article XI, § 9 of the state constitution provides:

> All taxes levied and collected for state purposes shall be paid into the state treasury. No indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer except in pursuance of an appropriation for the specific purpose first made. The Legislature shall provide by suitable enactment for carrying this section into effect.

We interpret SDCL 31-2-38 as providing a continuing appropriation for damages awarded and costs assessed against the State of South Dakota as a result of an action against the state under SDCL 31-2-34. The plain meaning of SDCL 31-2-38 is that damages awarded will be paid "out of the state highway fund from all the moneys levied and collected by the state by general state taxation for state highway purposes, or appropriated for state highway purposes."

Our final consideration is whether our interpretation of SDCL 31-2-34 and 31-2-38 conflicts with the requirements of Article XI, § 8 of the state constitution which requires that the license, registration fees or other charges for operating a motor vehicle on

the public highways and the proceeds from taxes for motor fuels used to propel motor vehicles upon public highways, "shall be used exclusively for the maintenance, construction and supervision of highways and bridges of this state."

On prior occasions, this court has strictly construed the meaning of Article XI, § 8. In Opinion of the Supreme Court Etc., 257 N.W.2d 442 (S.D. 1977), the court observed:

> The history of Article XI, § 8 of our Constitution, ... clearly indicates that this is a restricted and impressed fund created by the Constitution that prevents the use of the funds described in the Article for payment of any obligation of the state other than those described in the Article.

Id. at 445. In South Dakota Auto. Club, Inc. v. Volk, 305 N.W.2d 693 (S.D., 1981), the court held:

> [I]n reading the amendment to Art. XI § 8, the obvious intent of the framers and voters was to dedicate the proceeds of the taxes on fuel used by motor vehicles on the highways for the maintenance, construction, and supervision of the highways and bridges

> over which those motor vehicles traveled.

Id. at 699.

We do not believe that payment of damages for work performed on a highway construction project violates the intent of Article XI, § 8. We reverse Lindekugel to the extent it holds to the contrary.

4a. THE CIVIL RIGHTS CLAIM

Candee claims that the actions of James Myers gave rise to an action under 42 U.S.C 1983. Candee contends it was denied a property right without procedural and substantive due process when defendant Myers refused to allow Candee to bid on another highway construction project.

Under the Administrative Rules, before a prospective bidder may bid on state highway construction projects over $100,000.00, it must obtain a classification and maximum rating from DOT each year. A.R.S.D. 70:01:05:02. In April 1985 the prequalification committee for DOT issued a letter that prequalified Candee to bid on a maximum of $38,130,000.00 in highway construction projects.

In 1985 Candee requested the plans to bid on project 41, another highway construction project in the Black Hills. On August 12, 1985, Myers denied Candee's request for a proposal and plans on the 41 project. This decision was based on paragraph 2.3 of the Standard Specifications for Roads and Bridges, 1977 edition under which DOT reserves the right to refuse to issue a proposal if a bidder has "uncompleted work which, in the judgment of the department, might hinder or prevent the prompt completion of additional work if awarded" and in cases of "unsatisfactory performance on previous work." Myers noted that Candee had failed to meet the completion dates for projects 48 and 45, causing "inconvenience to the traveling public" and "economic loss to businesses dependent upon them."

Following the denial to furnish bidder forms, Candee requested a hearing before the highway commission. The commission found that Myers had acted correctly and upheld his decision to deny Candee bidding rights on the 41 project. This hearing and decision occurred six days before the 41 project's bid letting. Candee did not appeal from the commission's decision.

Candee claims that its prequalification to bid on highway construction contracts is a property right, and, as a result, it was entitled to a predeprivation hearing.

It is undisputed that Candee was given a hearing before the State Highway Commission before the 41 project's bid letting. Whether or not the right to bid on a highway construction project is a constitutionally protected property right is moot because the hearing before the highway commission afforded Candee adequate process. We express no opinion whether a § 1983 plaintiff must exhaust state court remedies or whether there exists a qualified immunity in this case.

4b. PUNITIVE DAMAGES

Having disposed of the claimed damages under 42 U.S.C. 1983, no cause of action exists upon which a claim for punitive damage may exist. We therefore affirm the trial court's dismissal of Candee's punitive damage claim.

5. COSTS

The circuit court entered its order taxing as costs the travel and living

expenses of a Rapid City court reporter who attended the taking of depositions in North Dakota, Minnesota and California.

SDCL 15-17-4 provides:

> In all cases where a party is allowed to recover costs the clerk must also tax as a part of the judgment the allowance of such party's witnesses', interpreters', translators', officers', and printers' fees, fees for the service of process, filing fees and the necessary expense of taking depositions and procuring necessary evidence.

Although the use of a Rapid City court reporter to take depositions in other states may have been a convenience to the individual defendants, such expenses do not qualify as "necessary" and should not have been allowed as costs under SDCL 15-17-4.

The actual expense attributable to the preparation and furnishing of transcripts of depositions taken by the individual defendants was taxed as costs by the trial court. Candee claims that those costs were prematurely taxed because the depositions may be used in the actions which remain against DOT. This argument is not a compelling reason

to defer the taxation of costs in this case.

CONCLUSION

We remand this case to the circuit court for trial on the issue of additional compensation for water under the contract. The breach of contract, implied contract and equitable claims should be reconsidered in light of our decision concerning Lindekugel. We affirm the circuit court's determination that no action lies for additional compensation for rock excavation under the terms of the contract, and that no claim lies for breach of civil rights under 42 U.S.C. 1983. The circuit court's decision regarding costs is modified according to our decision.

WUEST, Chief Justice, and MORGAN, and MILLER, Justices, concur.
SABERS, Justice, concurs in part and dissents in part.
HEEGE, Circuit Judge, for HENDERSON, Justice, disqualified.

SABERS, Justice (concurring in part and dissenting in part).

In concur expect that I dissent on that part of issue 4 which relates to the disqualification of Candee to bid on a third highway construction project in

the Black Hills, entitled project 41. The ruling on this matter by the trial court and the majority is premature. Granting summary judgment on one issue is proper only where that issue is "clearly distinct form the issues on which factual questions [remain]." Stelter v. Fosha, 9 Kan. App.2d 519, ___, 682 P.2d 682,685 (1984).

Courts in other jurisdictions have found error where summary judgment was granted on an issue which depended for its resolution upon another issue involving unresolved factual questions. For example, in Van Knight Steel Erection, Inc. v. Housing and Redev. Auth. of City of St. Paul, 430 N.W.2d 1 (Minn.Ct.App. 1988), a contractor moved for summary judgment on its claim against a developer, seeking final payment for work on the developer's construction project. The developer claimed summary judgment was inappropriate due to a second contractor's claim against the developer for increased costs, which the developer asserted were at least partially due to defective work by the first contractor. As a consequence, the developer claimed a right of set off against the payment to the first contractor for any

increased liability to the second contractor arising from defective work by the first contractor. Since the developer's liability to the second contractor was not yet determined, the developer argued that summary judgment was not proper. The trial court granted the motion for summary judgment, but was overruled by the court of appeals, who held that summary judgment was premature since a decision on the first contractor's claim depended upon the result of the second contractor's claim. In other words, where resolution of an issue depends upon the outcome of a second issue, summary judgment cannot be granted on the first issue until the second is resolved. See also Villa Charlotte Bronte, Inc. v. Commercial Union Ins. Co., 64 N.Y.2d 846, 487 N.Y.S.2d 314, 476 N.E.2d 640 (1985) (Error to enter partial summary judgment declaring that insurer was not required to defend officer of insured on defamation charge until factual questions regarding the making of the defamatory statements were resolved).

Although the reasons given by Department of Transportation Secretary Myers to deny Candee's request for a proposal and plans on project 41 appear

reasonable on their face, a closer examination reveals otherwise. In fact, if Candee Construction Company wins on issue 2 and proves that the Department of Transportation imposed unreasonable construction standards upon Candee, any claims of "unsatisfactory performance on previous work" and failure "to meet the completion dates for projects 48 and 45, causing 'inconvenience to the travelling public' and 'economic loss to businesses dependent upon them'" could be the fault of the Department of Transporation and not the fault of Candee Construction Company. In other words, if the delay and construction problems were caused by Department of Transporation, (i.e., wrongful imposition of unreasonable construction standards,) genuine issues of material fact exist and prevent summary judgment. Gorseth Int'l, Inc. v. Tenneco, Inc., 410 N.W.2d 159 (S.D.1987); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987). Therefore, any ruling on issue 4 prior to a jury verdict on issue 2, is premature.

APPENDIX B

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

CANDEE CONSTRUCTION COMPANY, INCORPORATED, a North Dakota Corporation,

Plaintiff,

vs.

Civil No. 87-2120

SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION, THE STATE OF SOUTH DAKOTA, JAMES MYERS, CHARLES PIPER, DENNIS LANDGUTH, GARY ENGEL, GLENN BINTLIFF, each in their individual and official capacities, and CHARLES LARSON, MAREL BUHLER, VERNON BUMP, JAMES HAMMELL, CLINT GREGORY, and LARRY DEJONG, each in their individual capacities,

Defendants.

DECISION OF THE COURT ON THE INDIVIDUALLY NAMED EMPLOYEE'S MOTION FOR SUMMARY JUDGMENT

BEFORE: THE HONORABLE ROLAND E. GROSSHANS
Circuit Court Judge, at

Rapid City, South Dakota, on
November 1, 1988

APPEARANCES:

For the Plaintiff: JOSEPH BUTLER
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Rapid City, South
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DAVID C. ROLAND
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For The State Dept.
of Transportation
and State of
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CARL QUIST
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For the Individual
Defendants: FRANK WALLAHAN

Attorney at Law
Rapid City, South
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DEBRA WATSON
Attorney at Law
Rapid City, South
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THE COURT: All right, I have got here to begin with copies, the original I am filing, of the findings of fact and the Court's order on the punitive damage claim dated yesterday, so for all of you present, here's the pickup pile when I leave.

MR. WALLAHAN: Dated yesterday, the 31st?

THE COURT: Yes.

MR. WALLAHAN: Is that the form, Your Honor, that we submitted to you or has it been changed?

THE COURT: Yes, Defendants' form.

Incidentally, just as an aside on that particular matter on the punitives, the statute was pretty well briefed in a law review article, the last issue of the Barrister, as I recall, on this issue, and not really the basis on which I decided it in this case, but it has been sort of taken up by our State Supreme Court in the City of Mitchell versus Beauregard and Knox, a decision

by the Supreme Court on October 26th, 1988, and you might want to look at Justice Henderson's special concurring opinion on your own, whatever.

Now, then, I have the decision here, memorandum decision on State's summary judgment and I even have one extra copy, one for everybody, there should be one, and because of the time crunch, recognizing the logistics of this case, I have roughed out my decision on the present motion and other things. I didn't have time, because I didn't put my pen down until late yesterday afternoon, I didn't have time to organize it and didn't have time to have it typed and so it suffers from a lack of organization and clarity. Be that as it may, I'm going to rule from the bench right now.

As I understand it, then I'll have done all that you have permitted me to do in this case so far. Is that correct? There's no other housekeeping matters to take up?

MR. WALLAHAN: I'm not aware of any, Your Honor.

THE COURT: All right, so, Mr. Dodge -- and I would appreciate it if you would just let me do my best and get

it on the record and then we'll part company and I'll take up the next trial.

Defendants move per SDCL 15-6-12 for judgment of the pleadings. However, matters outside the pleadings have been considered by the Court and, therefore, this is treated as a motion for summary judgment per SDCL 15-6-56. I recognize that summary judgment is not looked on with favor in actions involving state of mind as is generally the case in Section 1983, civil rights actions. However, where there is no genuine issue of material fact existing and the moving party is entitled to summary judgment as a matter of law, it is looked upon with favor and is particularly adaptable to expose sham claims. The trial court is not bound by conclusory allegations in a complaint artfully plead and the Courts also serve to ensure that governmental officials are not harassed by frivolous lawsuits. It is conceded that Defendants were acting under color of state law. It's conceded that in August of '85, when Plaintiff sought to bid and was denied by Secretary Myers, that CCC, Plaintiff, was in default or penalty under project 45 and 48 or one of the two projects. Forgetting the conclusory and artful allegations

against Secretary Myers, the substance of the action against him is that he did, without just cause, withdraw and deprive CCC of its bidding rights in South Dakota without due process of law.

I'll discuss that later.

The allegations against Piper are that he communicated information to third persons in Hill City, negatively reflecting upon CCC without a basis in fact. I say, so what? That gives rise to a defamation or libel or slander lawsuit, whatever it is. He has First Amendment Rights to freedom of speech and the State has a remedy for that, if there's any grievance there.

Additionally, they allege that he communicated erroneous and misleading information to the DOT in Pierre. I say, so what? Again, you have your other state remedy.

The allegations against Landguth, that he breached his duty to be in frequent contact with the Plaintiff. He failed to respond timely to CCC's request for meetings. That he communicated false or misleading information to third persons. To all of that, I say, so what? You have your other theory for a lawsuit against

Defendant, Landguth, if you want to bring it.

The allegations against Engel, that he made arbitrary and capricious decisions relating to the 45 and 48 projects and you will see in part that that cause or claim is still alive as a result of the decision in the rock claim and water claim. He increased completion standards, et cetera, construction standards, et cetera, and in part you'll find that's still alive in this. Intentionally failed to supervise survey crews and that CCC would be the last to get a survey crew, logically I follow Ms. Watson's little hypothetical in her brief about someone's got to be last, I guess. That he communicated false and misleading information to others and I say there's another remedy under the civil other than civil rights.

The allegations against Bintliff, that he exceeded his authority as project inspector by making engineering decisions and that may be still alive. That he demanded excessive construction standards, in part, that's still alive. That he altered plans without authority, that's still alive. That he threatened CCC with bankruptcy with use of the spec

book and perhaps in part that's still alive for whatever it can be under the excessive quality of construction standards claim which was a part of count one, count two, seven and eight, I believe, if I got that right. And that he threatened Arnie Lefor, well, maybe Arnie should sue him. All in all, there are adequate state court remedies against these individually named employee-defendants for libel, slander, defamation and intentional interference with contract rights or whatever. These actions complained of are for violations of duties of care arising out of state tort law.

Therefore, all that is left, as far as I am concerned, is the denial of bidding rights allegations and under Daniels versus Williams, 106 Supreme Court, 677, Plaintiff must show a right to be protected from arbitrary or irrational governmental conduct. I accept Mr. Hofer's theory that there is a right and however inasmuch as they were late or in default or in penalty, regardless of how minimal they may argue it, then Secretary Myers' decision was not arbitrary or irrational as I read SDCL 31-5-10 or Reg No. 70.01, 5, 17 or 25 or the other Regs or spec book clause

2.3 and the additional aspect of the Daniels versus Williams, as a deprivation of a right to fair procedure and so, thereafter, the denial by Myers, they have appeal rights which they partially availed themselves of by a hearing before the Highway Commission by submission of the claims, so I accept the premise of almost all of your case authority, Mr. Hofer. Getting to the property rights and I see that as a corporate citizen, they have property interests to bid; however, the just cause argument for questioning their eligibility to bid project 41, the eligibility existed here because at the time the contract was to be bid and let, CCC was in default or penalty, not only that, but even if not, the secretary of the department reasonably believed that the additional work on project 41 would be more than CCC could handle at the time and under the circumstances as he knew them to be at that time or reasonably believed them to be, in good faith at the time, then on behalf of the taxpayers, he can determine to spread the business around to best assure the best performance and completion of all of the projects and that's the overriding governmental interest that I

believe exists over and above contractors' and individual contractor's right to have a cut of the gravy project. So as a public servant, he has as much of a duty to exercise his best judgment under the circumstances as he knows them at that time to be and if he reasonably feels that CCC isn't capable or is in default or that quite frankly perhaps he just doesn't want to do business with them again because of some unfortunate prior experiences and then he has the ability to make that decision. That is not unfettered discretion in the secretary. His decisions are subject to review by the commission and eventually by the Courts.

I reject completely your theory of deprivation of liberty interests in the present case, considering the totality of the circumstances as made known to this Court on the record before me concerning project 48 and 45. On the issue of the pre-deprivation hearing versus a post-deprivation hearing, it seems the Plaintiff is suggesting that it is entitled to a hearing before who? Myers or the commissions, before Myers in his own individual mind makes his decision to determine CCC's ineligible as a bidder? Now, is it when he first

begins to suspect that this might be a problem? Are they entitled to this hearing despite the face he may not even have voiced his suspicion to anybody or are they entitled to this hearing when the thought first enters his mind or when the thought begins to solidify or just before the thought becomes finalized? Why not notice from Secretary Myers to Candee at each stage of these thought processes as they begin to develop in his mind's eye?

So I accept in part Mr. Wallahan's argument, considering the facts and circumstances that apparently once he had made his decision, he made it known to CCC and they had a hearing and I considered that to be the pre-deprivation hearing and the commission has the power to reverse secretary Myers. Or if you want to take it beyond that, when are they entitled to this pre-deprivation hearing, when Piper is about to communicate with Myers on the subject?

In other words, there's no logical place for this notice in this set of circumstances to be sent when his ideas are being formulated in the individual employee's mind, when they begin to suspect. I think that's sort of absurd.

Nothing could ever get done. Something has to start or trigger the process. It's significant that the protected procedural due process starts after the -- it's sufficient, I mean, that the protected procedural due process by way of notice starts after the secretary makes his mind up, makes his decision. So when he writes his letter on August 12th, then CCC has its notice and has its hearing before the commission.

An interesting point is that the talk about the time element and such as that, it appears to me from the admissions of counsel on this record that CCC could have sought the bidding documents and proposals and whatever, plans and specs months in advance so they wouldn't have got into this August 6th, August 12, August 22nd, and August 23rd deadline, and maybe then Secretary Myers would have made his decision earlier and they could have had a more adequate pre-deprivation hearing before the commission. So now Plaintiff, CCC, wants this Court to in effect at this stage, or the jury in effect, to supplement its own decision in place of that of the commission as a means, clear means of circumventing the appellate

criteria and case law in South Dakota flowing from SDCL 1-26-36.

Defendant Myers is the state official who initially has the discretionary power by his position to make the determination on behalf of the department that CCC is not an eligible bidder. He did so and gave notice of his decision to CCC who then asked for and got a hearing before the commission which as I mentioned before had the power to reverse, it didn't. The commission didn't reverse the secretary. CCC could have appealed, it didn't. To hold that Secretary Myers, as I mentioned, must give notice of his preliminary thought processes prior to forming his decision that CCC is ineligible is absurd and not contemplated by the statute and rules and the spec book, so I am holding that our statutory scheme in South Dakota provides adequate appellate due process, so as a whole, the statutes, the regs and the spec book does not deprive CCC of procedural due process nor substantive due process.

It seems to me a little bit as though the barrage of letters attached to the Gardner affidavit sort of in a sense of the word, substantiate the

decision of Myers that maybe he had better protect the citizens and taxpayers of the State of South Dakota from giving the gravy project to a contractor who they were having problems with on project 45 and 48.

You argue that the decision two and a half weeks before the 41 project bid was let was untimely by defendants, yet what triggered this decision was the Plaintiff's request for the bid proposals and as I already mentioned this, just a short time before, Myers apparently made up his decision.

Plaintiff argues inability to seek future employment by way of bidding, without any evidence that this is the fact. In fact after the proceedings complained of and after some struggles, CCC did become a sub insofar as the state is concerned on project 41. The reason ultimately that they weren't a sub, as I understand it from counsel, has nothing to do with any activity by the state.

You argue in your brief that it was Myers and the individual we named employees' actions in determining CCC ineligible that caused CCC to become bankrupt. It could be as easily argued that the bidding error and problems on

project 45 and 48 caused it to become bankrupt, if that in fact is the case, I don't know whether it is or not, you just mentioned it in your brief.

Further, who is to say that CCC would even have been a successful bidder on project 41 or that it would have been able to complete the project if it had been awarded to them or even if they would have made a profit on project 41. To argue that a year later the bulk of the time extension requests of CCC on project 45 and 48 were eventually granted means that on August 12, of '85, we have to view the actions of secretary Myers today looking back rather than as he knew or believed them to be at that point in time.

In other words, it's using hindsight as a means of measuring the standards which I reject.

In the words of Justice Rehnquist in Paul versus Davis, and I paraphrase a little bit, that's 96 Supreme Court, 1155, if Plaintiff's reasoning in certain of these areas were to follow in cases such as the instant one, it's hard to perceive any logical stopping place where a 1983 action would not lie whenever a governmental official, as a result of some thought process based on

facts he believes to be true, makes a decision adverse to a citizen attempting to do business with the state. Such an interpretation would make the Fourteenth Amendment a part of tort law to be superimposed over whatever tort law or contract systems and doctrines are already in place in the various states.

South Dakota law affords the Plaintiff adequate tort remedies. South Dakota law affords Plaintiff adequate contract remedies and as a result of this Court's decision on Defendant's, DOT's, motion for summary judgment.

Part of the remaining action, Plaintiff against DOT consists of the same matters of which Plaintiff in part herein complains of and the South Dakota statutes, 31-5-10, the rules and regulations, 70.01, 5:17, 23 and 25, and others, and the spec book, 2.3, and SDCL 1-26, and the case law of South Dakota provides CCC with adequate remedies to challenge the decisions of Secretary Myers. Plaintiff did not avail itself of these remedies. In part, I adopt Mr. Wallahan's arguments on the exhaustion of remedies, the first and third theories that Kirklin (phonetic) refers to in his treatise and both of those apply and I am ruling that on a strict

exhaustion of remedies, first of all, Plaintiff is precluded and also I am ruling in addition that in the third theory, South Dakota has other available adequate remedies that will accomplish the same result with the exception of a claim for attorney's fees.

I already ruled on the post-deprivation hearing versus the pre-deprivation hearing.

I am finding that there was in effect an adequate, sufficient pre-deprivation hearing. If there is a time shortage of time between the notice on August 12th, and the date of the hearing, then that could have well been extended by Plaintiff by seeking the bid proposals and triggering the process at an earlier time. Therefore, Defendants' motion for summary judgment is granted.

Pursuant to SDCL 15-6-42B and as a result of my decision on the motion for partial summary judgment which grants the partial summary judgment on the rock claim and the water claim and leaving only in place the other issues underlying, there were some disputes as to the amount of rock or whatever it was and so on, those are still available and we still have left the excessive quality of construction standards required and I

set that forth in some length and my reasons for leaving that in and I don't think at this point in time as I read the one State Supreme Court decision, it was Judge Bradshaw deciding that where the Supreme Court talks about the excesses of the engineer in that case and that is an issue for a tryer of fact which is the jury in this case.

So under SDCL 15-6-54B and concerning the fact that I decided adversely to Plaintiffs on punitive damages, adversely decided on the civil rights action and decided adversely to Plaintiffs on the rock claim and the water claim, that I have determined that this action being an action involving multiple claims, multiple parties, some of the issues involved are differently styled causes of action, some of which are now gone, yet some of which now remain, this Court expressly determines that there is no just reason for further delay and these decisions dated today, including the punitive damage decision, DOT's motion for summary judgment and the civil decisions are final judgments. This decision is made by the trial Court on the basis that trial of this complex action would be prolonged and very expensive, not only to both parties, but

to the Court system and taxing to the Court system as well as I expect it will last some two months and many of these issues decided heretofore vitally affect the trial strategy and presentation of trial evidence and damage evidence and a final decision by the State Supreme Court of the Trial Court's preliminary rulings as expressed today could well either dispose of the case entirely, avoid having to try the case twice, make it easier to seat a jury, avoid needless presentation of irrelevant evidence and generally benefit everyone concerned.

Finally, the action before the Court is in two distinguishable areas. Courts one, two, seven and eight for sums due under the contract for projects 45 and 48 and for deprivation of civil rights as a result of Plaintiff's inability to bid on project 41 and the employees' deprivation of liberty interest on project 41 and project 45 and 48, as I see it, have little or nothing to do with each other and the theories have little or nothing to do with each other. The theories are entirely different or sufficiently different to warrant trying the issues together at the same trial and would be detrimental to the most efficient

progress of this case, should the Supreme Court reverse the Trial Court, it would be needlessly confusing and unfair to the jurors who are selected to try the case and to the presentation of evidence which might be relevant on one theory and might well be prejudicial to a defending party or a plaintiffing party on the other theory and the Court determines that separate trials, if so ordered, I am ordering that the actions, the counts are going to be separately tried, if the Supreme Court reverses me on the civil rights action.

This is done pursuant to SDCL 15-6-42B and Christensen versus Strand, 132 Northwest 2nd, 386. If the Supreme Court determines that the action on counts one, two, seven and eight, as well as the actions on count fourteen and fifteen are still alive, then as I mentioned, the lawsuit will be tried separate and apart from each other.

The prevailing parties will prepare orders consistent with the Court's ruling from the bench.

Any further record?

MR. WALLAHAN: The only thing I would ask is that if Mr. Dodge could type up the Court's remarks as soon

possible, otherwise I will go from my notes I have taken.

THE COURT: I have got a trial just as soon as I finish here and I am running late.

MR. WALLAHAN: I'll be able to get this down to you to look at later today then.

THE COURT: I won't look at it today because I'm going to be working into the evening.

MR. WALLAHAN: You want it dated back nunc pro tunc back to comport with your judgment?

THE COURT: Yes.

(At this time, these proceedings were concluded.)

STATE OF SOUTH DAKOTA)
CERTIFICATE
)SS.
COUNTY OF PENNINGTON)

This is to certify that I, Dennis L. Dodge, Official Court Reporter of the State of South Dakota, took the proceedings of the foregoing Decision of the Court on the Individually Named Employees' Motion for Summary Judgment, and the foregoing pages 1 through 18, inclusive, are a true, correct and

complete transcript of said stenotype notes.

Dated at Rapid City, South Dakota, this _____ day of November, 1988.

_____

Dennis L. Dodge-Court Reporter
Rapid City, South Dakota

Appendix C

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

CANDEE CONSTRUCTION COMPANY, INC. a North Dakota Corporation,
Plaintiff and Appellant,

vs.

SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION, THE STATE OF SOUTH DAKOTA, JAMES MYERS, CHARLES PIPER, DENNIS LANDGUTH, GARY ENGEL, GLENN BINTLIFF, each in their individual and official capacities, and CHARLES LARSON, MAREL BUHLER, VERNON BUMP, JAMES HAMMELL, CLINT GREGORY, and LARRY DEJONG, each in their individual capacities,

Defendants and Appellees.

ORDER DENYING REHEARING

#16552, #16553, #16558

Petitions for rehearing in the above cause having been filed November 1, 1989, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petitions for rehearing are denied.

DATED at Pierre, South Dakota, this 17th day of November, 1989.

BY THE COURT:

/s/ George W. Wuest
Chief Justice

ATTEST:

/s/ Gloria C. Engel
Clerk of the Supreme Court
(SEAL)

Appendix D

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

CANDEE CONSTRUCTION COMPANY, INCORPORATED, a North Dakota Corporation,

Plaintiff,

vs.

SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION, THE STATE OF SOUTH DAKOTA, JAMES MYERS, CHARLES PIPER, DENNIS LANDGUTH, GARY ENGEL, GLENN BINTLIFF, each in their individual and official capacities, and CHARLES LARSON, MAREL BUHLER, VERNON BUMP, JAMES HAMMELL, CLINT GREGORY, and LARRY DEJONG, each in their individual capacities,

Defendants.

Civil No. 87-210

FINAL ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS MYERS, PIPER LANDGUTH, ENGEL AND BINTLIFF

Defendants Myers, Piper, Landguth, Engel and Bintliff having filed a Motion

for Dismissal, Judgment on the Pleadings or Summary Judgment and scheduled a hearing thereon; counsel for the plaintiff and the individual defendants having filed written briefs and pertinent discovery documents with the court; a hearing having been held on said Motion on November 1, 1988, before the Honorable Roland E. Grosshans, Circuit Court Judge, plaintiff appearing through its counsel, Joe Butler, Terry Hofer, Dave Beaudoin and Dave Roland; the SDDOT and State of South Dakota appearing through its counsel, Tom Lehnert and Carl Quist; the individual defendants appearing through their counsel, Franklin J. Wallahan and Debra Watson; the court having reviewed the court file including the briefs filed by counsel and having considered oral argument and therefore will treat this as a motion for summary judgment; the court finding that no genuine issue of material fact exists; that good cause exists for the relief hereinafter granted; and the court expressly finding that there is not just reason for delay pursuant to SDCL § 15-6-54(b) and that entry of final judgment as a matter of law ought to be entered; now, therefore,

IT IS HEREBY ORDERED That the motion of Defendants Myers, Piper, Landguth, Engel and Bintliff for Summary Judgment be, and it hereby is, in all things granted.

Dated this 8th day of November, 1988, nunc pro tunc November 2, 1988.

BY THE COURT:
/s/ Roland E. Grosshans
Roland E. Grosshans
Circuit Court Judge

ATTEST:

/s/ Frank E. Condon
Clerk of Courts

By: /s/ Cynthia J. Nelson
Deputy

(SEAL)

Pennington County, S.D
FILED
IN THE CIRCUIT COURT
NOV - 9, 1988

Frank E. Gordon, Clerk
By CJN Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

CANDEE CONSTRUCTION COMPANY, INCORPORATED, a North Dakota Corporation,

Plaintiff,

vs.

SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION, THE STATE OF SOUTH DAKOTA, JAMES MYERS, CHARLES PIPER, DENNIS LANDGUTH, GARY ENGEL, GLENN BINTLIFF, each in their individual and official capacities, and CHARLES LARSON, MAREL BUHLER, VERNON BUMP, JAMES HAMMELL, CLINT GREGORY, and LARRY DEJONG, each in their individual capacities,

Defendants.

CIV. # 87-210

FINAL JUDGMENT
(SDCL 15-6-54(b)

On November 28, 1988, Plaintiff, Candee Construction Company, Inc., filed its "Motion for 54(b) Order." Plaintiff seeks finality, pursuant to SDCL 15-6-54(b), of this Court's August 3, 1988, nunc pro tunc July 13, 1988, Pretrial Order. That Order, inter alia, dismissed Counts 3, 4, 5, 6, 10, 11, 12,

13, 14, 15 and 16 of Plaintiff's Second Amended Complaint, as related to Defendants, South Dakota Department of Transportation and the State of South Dakota.

On December 22, 1988, this Court conducted a hearing on Plaintiff's motion. Plaintiff is represented by Terry L. Hofer and David Beaudoin; State Defendants were represented by Tom Lehnert; Individual Defendants were represented by Debra Watson. After oral argument on the record, the Court granted Plaintiff's motion.

The Court previously entered two final judgments against Plaintiff on November 9, 1988. Plaintiff represents to the Court that it intends to appeal from these final judgments. The Court has continued the trial of this case pending appeal. Under this procedural posture, the Court recognizes that there will be no delay to State Defendants and no economic and solvency considerations adverse to State Defendants by this 54(b) certification. At oral argument, Plaintiff represented to the Court that it wished to challenge LindeKugel. A successful challenge would be helpful to this Court at trial to be conducted after appeal. Under the overall

circumstances and exigencies of this case, the Court exercises its discretion in favor of 54(b) certification. Ochs V. Northwestern Nat. Life Ins. Co., 254 N.W.2d 163 (S.D. 1977); SDCL 15-6-54(b). Accordingly, it is hereby

ORDERED, ADJUGED AND DECREED that Plaintiff's motion for 54(b) finality is granted, that the Court expressly determines that there is no just reason for delay, and that the Court expressly directs entry of final judgment as to the Court's August 3, 1988, nunc pro tunc July 13, 1988, Pretrial order, pursuant to SDCL 15-6-54(b).

Dated this 3 day of January, 1989.

BY THE COURT:
/s/ Roland E. Grosshans
The Honorable Roland E. Grosshans
Circuit Court Judge

ATTEST:

Frank E. Condon, Clerk of Courts

By /s/ Pam Preston

(SEAL)

Pennington County, S.D
FILED

IN THE CIRCUIT COURT
JAN - 3, 1989

Frank E. Gordon, Clerk
By pp Deputy

Appendix E

UNITED STATES CONSTITUTION

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 42, United States Code †1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, suit to be liable to the party injured in an action at law, in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

ADMINISTRATIVE REGULATIONS OF SOUTH DAKOTA

70:01:05:02. Classification and maximum capacity rating. A prospective bidder shall obtain a classification and maximum capacity rating granted by the committee pursuant to this chapter before bidding on state highway construction projects estimated at $100,000 or more.

Source. SL 1975, ch 16, § 1; 6 SDR 109, effective May 29, 1980, 8 SDR 45, effective October 28, 1981; 8 SDR 170, effective June 21, 1982.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:01:05:03. Procedure for obtaining classification and capacity rating. To obtain a classification and maximum capacity rating a prospective bidder shall submit to the committee, upon a form furnished by the department, an experience questionnaire and financial statement, under oath, supported by a certification by a certified public

accountant or a South Dakota licensed public accountant concerning the fairness of the financial position on the statement. The questionnaire shall include, but not be limited to, the bidder's equipment, organization, prior experience, and any disbarment or pending disbarment by a state from bidding on highway construction projects. At its discretion, the committee may request additional information.

Source: SL 1975, ch 16 § 1, 8 SDR 45, effective October 28, 1981; 8 SDR 98, effective February 24, 1982.
General Authority: SDCL 31-5-10.

* * *

70:01:05:08. Rating effective for one year. A classification and maximum capacity rating shall remain in effect for one year from the date of final approval by the committee.

Source: SL 1975, ch 15, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 98, effective February 24, 1982.
General Authority: SDCL 31-5-10.
Law Implemented: SDCL 31-5-10.

70:01:05:09. Procedure for requesting bid proposals. A prospective bidder who has received a classification and maximum capacity rating pursuant to this chapter may request bid proposals on a DHAE-2 request form. The form shall be furnished by the committee.

Source: SL 1975, ch 16 § 1; 6 SDR 109, effective May 29, 1980; 8 SDR 45, effective October 28, 1981.
General Authority: SDCL 31-5-10.
Law Implemented: SDCL 31-5-10.

SOUTH DAKOTA STANDARD SPECIFICATION FOR ROADS AND BRIDGES (1977 Edition).

2.3 ISSUANCE OF PROPOSAL FORM - Prior to receiving any bidding proposal form, prequalifed bidders will be required to submit a Plan and Equipment Questionnaire on a form furnished by the Department, showing his status at the time as to his ability to properly handle the work for which he is requesting proposal forms. The Department reserves the right to disqualify or refuse to issue a proposal form if a bidder is in default for any of the following reasons:

A. Lack of competency and adequate machinery, plant and other equipment, as revealed by the financial statement and experience questionnaires.

B. Uncompleted work which, in the judgment of the Department, might hinder or prevent the prompt completion of additional work if awarded.

C. Failure to pay, or satisfactorily settle, all legal obligations due for labor and material on former

contracts in force at the time of issuance of proposals.

D. Failure to comply with any prequalification regulations of the Department.

E. Default under previous contracts.

F. Unsatisfactory performance on previous work.

APPENDIX F

SOUTH DAKOTA DEPARTMENT
OF TRANSPORTATION
700 Broadway Avenue East
Pierre, South Dakota 57501

August 12, 1985

Keith Candee
Candee Construction Company
P. O. Box 947
Dickinson, N. D. 58601

Re: Project HES-FL-F0016(17)41 &
FHA 001-2(3)

Dear Mr. Candee:

The South Dakota Department of Transporation is in receipt of your request for plans and bidding proposals dated August 6, 1985.

Under paragraph 2.3 of the Standard Specifications for Roads and Bridges,

1977 Edition, the Department reserves the right to refuse to issue a proposal if a bidder has "uncompleted work which, in the judgment of the Department, might hinder or prevent the prompt completion of additional work if awarded" and in cases of "unsatisfactory performance on previous work."

Performance on current contracts that your company has on the projects between the Keystone Wye and Three Forks junction east of Hill City has not been timely. Completion dates have not been met. Coordination of these projects with the paving contractor has been negatively affected. Your performance in a less than timely fashion has caused inconvenience to the traveling public in this area as well as economic loss to businesses dependant upon them.

Therefore, the Department denies your request for a proposal and plans on the above referenced project.

Sincerely,

/s/ James R. Myers

JAMES R. MYERS

Secretary

JRM/ca

cc: Charles Piper
Charles Larsen